IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

PORTLAND GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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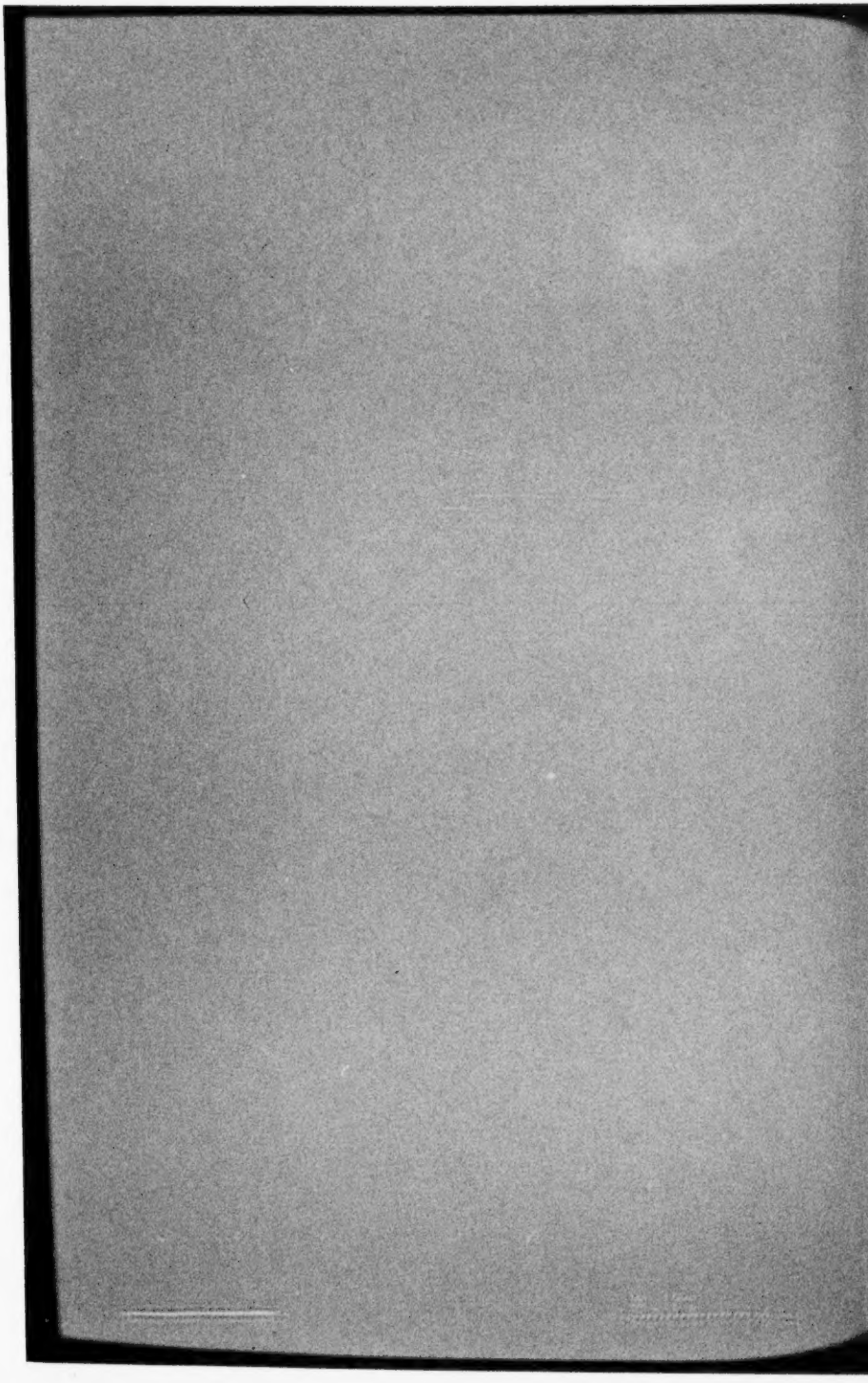

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To the Supreme Court of the United States:

The petitioner, Portland General Electric Company, relying upon Title 28, Sec. 347, U. S. C. A. (Sec. 240 of the Judicial Code) to sustain the jurisdiction of this Court, respectfully shows to this Honorable Court as follows:

The petitioner owns, operates and maintains an electric power submarine cable, which, pursuant to authority duly granted, crosses the Willamette River in Portland, Oregon, and is used to supply electric energy to petitioner's customers. The cable is attached to connections on each bank of the river and between said connections lies loosely on the bed of the river with sufficient slack in it to permit its

being raised to the surface as occasion may require for examination or repairs.

The *"B. F. Shaw"*, a merchant vessel owned by the respondent, while manuvering in the Willamette River, negligently dragged its anchor under or across said cable with the result that it was ruptured and destroyed, to petitioner's damage in the sum of $25,000.00.

Petitioner filed a libel in the District Court of the United States for the District of Oregon which was amended in certain particulars so that the matter finally came before the District Court on exceptions to the second amended libel. The ground of these exceptions was that the cause was not within the Admiralty jurisdiction, since the cable was, so the exceptor stated, a land structure. The court sustained the exceptions and entered a decree dismissing the libel, which decree was later affirmed by the Circuit Court of Appeals for the Ninth Circuit in a Per Curiam decision filed May 8, 1944.

It is to review that decision that petitioner now seeks a writ.

THE REASON RELIED ON FOR THE ISSUANCE OF THE WRIT IS: That this is an important point of Admiralty jurisdiction on which the courts in the different circuits are at variance and it is in the public interest that it be settled, all as will be more appropriately stated in the Brief attached to this petition.

Wherefore your petitioner respectfully prays that this Honorable Court will issue its writ of certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify the record in this cause for review and decision by this Court of the question involved.

And your petitioner will ever pray.

ERSKINE WOOD,
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Portland, Oregon.
Proctor for Petitioner.

Dated July 18, 1944.

I, Erskine Wood, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.

ERSKINE WOOD.

BRIEF

In *Bell Telephone Company of Pennsylvania vs. United States of America* (as owner of steamship Cavalcade), 1943 A. M. C. 220, the Court succinctly states the split in the authorities as follows:

"Jurisdiction, having been contested, has been retained in the following causes having to do with submarine cables:

"*Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc.*, 1915, 221 Fed. 105 (EDNY); *New York Telephone Co. vs. Cities Service Trans. Co.*, 1938 A. M. C. 775, 23 Fed. Supp. 426 (EDNY); *United States vs. North German Lloyd* (1917), 239 Fed. 587 (SDNY); *The Toledo* (1917), 242 Fed. 168 (DNJ); *United*

States vs. SS Majestic, Oceanic Steam Navigation Co., Ltd., 1932 A. M. C. 1079 (SDNY); *United States vs. Tug Williams*, 1941 A. M. C. 1588 (SDNY).

"Jurisdiction has been denied in:

"*Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co.*, (9CCA), 1927 A. M. C. 410, 17 F. (2d) 239; Certiorari denied, 274 U. S. 745; *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, (9CCA), 1934 A. M. C. 1442, 73 F. (2d) 200; *The Mont Agel*, 1924 A. M. C. 401 (E. D. La.); *Postal Telegraph-Cable Co. vs. The Cananova*, 1942 A. M. C. 281 (SD Fla.)."

With a good-humored thrust at the government's chameleon-like changes—asserting the jurisdiction in one case, and challenging it in the next, as interest serves—the Court adds:

"Catholicity of approach has characterized the attitude of the government in such cases, since in three of those cited in the first group it has successfully appealed to that jurisdiction which it now asserts to be non-existent. The cause against *The Majestic*, the fifth in the list, was presented to the Southern District Court five years after the decision of the Nippon Yusen case in the 9th Circuit, to which the government now yields elaborate deference in behalf of the pending exceptions.

"It seems rather late in the day to reopen a question which has been deemed to be at rest in the Eastern and Southern Districts for a matter of twenty-seven years, the *Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc., supra*, having been decided in 1915."

Turning now from the foregoing quotation, we briefly analyze the cases in the above list. We take them chronologically, without regard to whether they were for or against the jurisdiction.

Postal Telegraph Cable Co. vs. P. Sanford Ross, 221 F. 105 (1915), was a submarine cable, ruptured by a dredge. The Court said the test of jurisdiction was whether or not the cable was a *structure* on land. It concluded that it was not such a structure. The fact that it was a telegraph, rather than a power cable, was not a deciding factor. The decision was rested on the holding that the cable was not a land structure. As this case was the leading authority in the New York Districts, and has been followed there ever since, we quote the pertinent part of the opinion.

"The cases above cited, in which jurisdiction has been assumed for such an accident, seem to have been based upon the theory that the location of the cable was within the limits of navigable waters, that the injury had to do with the operations of navigation, that the cable itself was connected with the subject of navigation when occupying some portion of the navigable channel, and that the injured object (the cable) was not a structure on the land, nor affixed thereto as a part thereof.

"The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel, and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction, it was occasioned by the operations of the anchor

and the handling of the boat, and the cable itself is akin rather to matters connected with the ocean than to those of the land, although it was supported at each end upon the shore, and, for the purpose of transmitting an electric current, has no closer relation per se to navigation than would a wire crossing over a stream, in the air, and which was employed to transmit news as to ships, etc. The cable is further like a beacon or buoy, in that it is merely located at the spot, even though attached to the land at each end.

"Assuming that no jurisdiction in admiralty exists under the United States Constitution over the actual sustaining of damage (and apart from the cause), unless the object damaged be on the water, or within its body, rather than on land, that is, a part of the land (The Plymouth, supra), let us consider whether this cable was a fixture so attached to the land as to be a part thereof, and in that sense a "structure" on shore.

"If the telegraph company had maintained some wires across the river, in the air, and also some wires on a bridge just over the cable, the cases cited show that any injury to the bridge, or the wires on the bridge, or in the air, would not give jurisdiction to the admiralty court, even if messages were alternately sent over the wires above and below water. If a platform for dredging had been located on piles in the water, an injury thereto by a boat would likewise occur on the land, as distinguished from the locality covered by the maritime jurisdiction (The Poughkeepsie, supra, and the case of

N. Y., N. H. & H. Tug Transfer No. 5 v. The R. J. Moran, therein cited).

"But suppose an injury were caused to the Atlantic cables on the high seas, by a steamer, could it be held that, because the cable had a landing on shore, it was a land fixture, and was not an object wholly within the maritime jurisdiction, where it lay supported by the bottom and not by its own buoyancy? If so, no damage by a boat to a sunken dry dock or vessel could lie in admiralty, if there were a shore mooring, and if it could not *at the time* be navigated.

"The case is not analogous to those where the maritime character of the object has been entirely lost, such as the case of a boat turned into a boathouse and solidly fastened to the shore. Woodruff v. One Covered Scow (D.C.), 30 Fed. 269.

"This case has been fully tried, subject to the objection as to the jurisdiction of the court over the cause of action, and to relegate the libelant to another court, and a new action, should not be the result unless the court is plainly without any authority to dispose of the issue raised upon the testimony. No part of the injury occurred beyond the limits of the tidewater, nor was the connection to the shore of any sort other than to insure a permanent passage of the current. There might even be instances where such a cable would not be carried to the shore, but rather (by induction or wireless) be used to transmit vibrations as a step in signaling. If the mere fact that it does not float, and rests on the bottom, makes an object a land fixture and structure, no admiralty

court could entertain a suit for injury by a boat or anchor to a grounded vessel. While the converse case, of injury by a cable suspended in the water or lying on the bottom, has been treated as an admiralty matter (see cases cited, supra), for there the injury occurred on the *maritime* object, yet the objection raised to the present case is fatal, if the injured cable was not wholly the object of admiralty jurisdiction.

"Any argument drawn from the results of the situation presented of necessity begs the question, and yet full discussion is necessary to reach the primary determination. But as the court is of the opinion that a submarine cable of this sort is not a *structure* (Court's italics) on the land and affixed thereto as an extension of the shore (208 U. S. at page 321, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), even though connected therewith as an aid to land commerce, it is therefore subject to maritime control.

"The plea to jurisdiction must be overruled, and the libelant may have a decree."

In *United States vs. North German Lloyd*, 239 Fed. 587 (1917), certain government cables in New York Harbor were injured. The government (contrary to its position in the present case) asserted the admiralty jurisdiction. The Court, following the Postal Telegraph Case, sustained the government's claim.

The pertinent part of the opinion follows:

"These facts require a finding that the Princess Alice was negligently grounded and afterward

floated in a negligent manner, resulting in injury to the cables in question, and will warrant a decree for the libelant unless the respondent's claim that admiralty has no jurisdiction be sound.

"The case of *Postal Telegraph Cable Co. vs. P. Sanford Ross* (D.C.), 221 Fed. 105, settles this claim adverse to the respondent unless it can be said that this rule was not approved in *The Raithmoor,* 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937. Judge Chatfield in the former case decided that a dredge coming in contact with a submarine telegraph cable crossing a tidewater navigable channel and resting on the bottom, although fastened on shore at each end for connection with land wires, was responsible in admiralty for damages inflicted on such cables due to the negligence of the dredge, holding that, where a cable lies in the bottom of a channel, it is within the admiralty jurisdiction and is maritime.

Counsel for respondent argues, however, that this rule was not approved in the later Raithmoor Case, while the case of Postal Telegraph Co. v. Ross was cited to the Supreme Court. It is not discussed in the opinion, nor is it disapproved. In the Raithmoor Case, a libel was filed in rem against the steamship Raithmoor to recover damages for tort due to the steamship while coming up the Delaware river, coming in contact with scow or pile driver and a structure then being erected by the United States government to serve as a beacon and with a temporary platform used in connection with the work of construction. The Supreme Court held, reversing the

District Court, that jurisdiction in admiralty existed under these facts. The Court said:

> " 'We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdition of admiralty in cases of tort normally attached—at least in all cases where the wrong was of a maritime character.'

"As I read this decision, I do not think it essential that the object injured should itself be an aid to navigation before liability attached in admiralty. Its location is controlling, and if, by reason of its location, it has a maritime relation, it is within the admiralty jurisdiction.

"Since the injuries had to do with the operations of navigation, and the cable itself was connected with the subject of navigation, when occupying some portion of the navigable channel, and was not a structure on land nor affixed thereto as a part thereof, I am of the opinion that admiralty has jurisdiction, and for these reasons will grant a decree in favor of the libelant."

In *The Toledo,* 242 Fed. 168 (1917), a submarine telegraph cable was damaged. The New Jersey District Court upheld the admiralty jurisdiction. After reviewing the authorities, the court said:

"It would seem that the cases cited above were, on principle, correctly decided. When a vessel on the high seas or navigable waters of the United States commits a tort by negligently injuring a cable, the

contention that the cable was lying on the bottom of the river or sea, and the ends thereof ultimately reached the land, and therefore admiralty does not have jurisdiction, ought not prevail, when all the other elements necessary to constitute a maritime tort are present.

"The exceptions will therefore be dismissed."

The *Mont Agel*, 1924 A. M. C. 401 (1924), did damage to a submarine telegraph cable. The District Court, Eastern District of Louisiana, denied jurisdiction, without opinion.

As we read the foregoing decisions, the fact that in some or all of them the cable was a telegraph cable and, therefore possibly sometimes used for transmitting messages in regard to ships, was not a factor in the decision, but rather, the decision was based simply on the ground that the cable was not a land structure. The phrase used in some of these decisions that the cable is "connected with the subject of navigation" we take to mean merely that it is located in navigable water. Indeed, this seems to be the interpretation put upon it in the next case which came up chronologically, *Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co.*, 17 Fed. (2d) 239 (1927).

This was a power cable. The court, after referring to the telegraph cable cases, and stating its view that jurisdiction in those cases was doubtful, said:

> "It is with even more difficulty that jurisdiction may be justified of claims for an injury committed to a cable used solely for the carrying of electric power. In the decisions in the

> telegraph cable cases, where the judges say that the cable is 'connected with the subject of navigation', that expression can mean no more than that the cable is established in navigable water, unless the assumption is indulged that such cable has some use in navigation by the transmission of messages there-through to direct the course and movement of vessels. No such use can follow as an incident to the purpose of the power cable." (17 Fed. (2d) 241.)

This is the first case, we believe, which suggests any possible distinction between a power cable and a telegraph cable, and this suggestion is what appears to have induced the district courts of New York to distinguish their later decisions from the Nippon Case by mentioning that the cable in question was a telegraph or telephone cable,—a distinction not present in their earlier decisions. Indeed, the Nippon case, itself, did not make that distinction, but merely hinted at it as a possible one. Even the Nippon case, which is the chief authority against us, while denying the jurisdiction, went on to say that the day might come, with expanding commerce, when the Admiralty jurisdiction would have to be extended to cover these cases. We refer to the following paragraph in the opinion:

> "Perhaps in the expanding scope of the industries, and the adoption of new methods and means for the transmission of power, with utilization of sea, river, and lake beds as supports for conduits and conveyances, it will be thought that a condition of business necessity exists as will justify the further extension of the admiralty jurisdiction, and perhaps the present case furnishes facts favorable to such an exten-

> sion. In our view, however, to so declare the law to be is to mark a step beyond the admiralty field as we understand it to have been thus far established by the decisions of the Supreme Court."

We do not admit that the jurisdiction needs "extension". We think it already exists. But if there is any doubt about it, we believe the time has come to extend it as above forecast.

Further following the list of decisions cited in the beginning of this brief, and still following the chronological order, we come next to *United States vs. SS Majestic,* Oceanic Steam Navigation Co., Ltd., 1932 A. M. C. 1079, not otherwise reported. There the cables were "submarine cables connecting Fort Hamilton and Fort Wadsworth, and used solely for military fire control and harbor defense purposes." The court sustained the jurisdiction without opinion, but stated, during oral argument, that the cables should be regarded as aids to navigation and commerce;—it is difficult to see on what grounds.

We come next to *Westfall Larson & Co. vs. Allman-Hubble Tugman Co.,* 1934 A. M. C. 1442, 73 Fed. (2d) 200, in which the Circuit Court of Appeals for the 9th Circuit merely followed its previous decision in the Nippon case. Just as it has done in the instant case.

Next in order is *New York Telephone Co. vs. Cities Service Trans. Co.,* 1938 A. M. C. 775, 23 Fed. Supp. 426, where a telephone cable was damaged. The District Court for the Eastern District of New York

followed the earlier New York decisions and disposed of the Nippon Case by remarking that, in the case before him, the cable sometimes transmitted messages relating "to matters of maritime import", and that, "to that extent, the case is distinguishable from the Nippon Yusen Kabushiki Kaisha Case and comes squarely within the doctrine as laid down in the Postal Telegraph Cable Co. Case. Therefore, the court has jurisdiction in admiralty."

Then came *United States vs. Tug Williams,* 1941 A. M. C. 1588. There, in the Southern District of New York, the court, at the instance of the United States as libellant, sustained admiralty jurisdiction over injury to a telephone cable in New York Harbor, on the authority of United States vs. North German Lloyd, supra, and cases therein cited.

Next came *Postal Telegraph Cable Co. vs. SS Cananova,* 1942 A. M. C. 281, where the District Court for the Southern District of Florida denied jurisdiction over damage to a telegraph cable. There was no written opinion, but the statement in A. M. C. says that the court refused to follow the New York district courts and followed the contrary authorities.

In *Bell Telephone Co. of Pa. vs. United States,* as owner of the steamship Cavalcade, 1943 A. M. C. 220, the District Court for the Eastern District of New York followed the earlier New York decisions and sustained jurisdiction over damage to telephone submarine cables. The Court said:

> "It is a permissible view that a cable is an adjunct to, rather than a prolongation or exten-

sion of, a structure on land, such as the pipe line which was held to be a necessary part of the plants of the oil company, in *The Russel No.* 6 case, supra."

We understand that this case is now before the United States Circuit Court of Appeals for the Second Circuit, on a motion by the government for a writ, prohibiting the District Court from proceeding; and that one ground of the motion is the alleged lack of admiralty jurisdiction.

We believe the foregoing are all the cable cases which have come before the courts, until we come to the case at bar. If there are any others they have escaped our attention. Certainly the list is complete enough to illustrate the conflict of decisions and the necessity, in the public interest, of having this question of admiralty jurisdiction settled. The more so, since, as was foreseen in the Nippon Case, industries and commerce, and the consequent use of submarine cables throughout the country are constantly increasing, with resultant increasing frequency of cable damage from ships' anchors. Another reason for this Honorable Court's deciding the question, and deciding it in favor of the admiralty jurisdiction, is, that with the huge fleet of Government vessels now operating as merchant ships, cable damage is, more often than not, done by the anchors of one of these Government owned ships, and unless the cable owner can sue the United States under the Suits in Admiralty Act, he is entirely without redress. He can not sue in the Court

of Claims, nor under the Tucker Act, since tort cases are not there entertained. His only chance of recovery, short of a special act of Congress, is to sue in the admiralty courts under the Suits in Admiralty Act, where the Government has consented to be sued.

The conflict in the decisions is positive and outright. We do not believe that this court will approve any such hairline distinction as that suggested between a telegraph or telephone cable and a power cable. It is certainly pretty tenuous to say that because a telephone cable may, among other messages, some times carry messages of maritime import, that it thereby comes under the jurisdiction, while another telephone cable (or power cable), which carried no such message would not be under the jurisdiction. If that distinction prevailed, then a power cable of a public utility, like petitioner, which supplied electricity to a telephone company for transmitting messages relating, among others to maritime import, or which furnished electricity to light a beacon on a dolphin or the lights on a pier (which almost all power cables of a public utility supplying a municipal seaport do), or even the power to operate loading cranes on a dock, would be within the jurisdiction; but one which did not, would be without. The distinction is entirely too fine spun. The plain and indisputable fact, as has been held in the New York cases, is that the cable is not a *structure* on land. It lies loosely on the bed of the river. It has, purposely, so much slack that it

can be lifted to the surface and laid across barges for examination or repair. At the time it is damaged, it is not even on the bottom but lifted up and dragged therefrom by the ship's anchor, so it is actually in the water, as was pointed out in Postal Telegraph Cable Co. vs. Ross, supra: "The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel, and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction," etc. The cable is not fastened to the land as a pile driven into the river bed. It merely has electrical connections on the bank connecting it with the land cable, which is of a different character. It is, as was said in Bell Telephone Case, supra, "an adjunct to, rather than a prolongation or extension of, a structure on land".

As the New York cases have pointed out, all the elements of admiralty jurisdiction are present. The tort is committed by a ship. In navigable water. The actual rupture of the cable, and damages, take place in navigable water. The cable itself is in such water, and not solid or fixed in place, and no more attached to the land than is a vessel tied up to a bank. In short, it is not a *land structure*.

This seems plain. But in view of the conflict of opinion between the courts, the question should, in the public interest, be settled; and we respectfully pray that your Honorable Court will issue its writ

of certiorari to the United States Court of Appeals for the 9th Circuit.

Respectfully submitted,

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NO. 314

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vs.

UNITED STATES OF AMERICA,
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Because, as hereinafter pointed out, this petition was not filed in time, we believe the Court will have no occasion to consider whether there are any "special or important reasons" for reviewing the case on writ of certiorari. However, since motion to dismiss the petition does not lie, we direct our answer and supporting brief not

only to the jurisdictional issue, but also to the "reason relied on for the issuance of the writ," together with reasons why the writ should not issue.

It will be noted that the District Court sustained exceptions to the second amended libel and thereupon dismissed the same, the order of dismissal being affirmed on appeal (Tr. of Rec., pp. 2-9, 29). On the record the allegations of the second amended libel must, of course, be taken as true (Tr. of Rec., pp. 2-4). It is significant that the allegations held insufficient appear in the *second* amended libel. The original libel, before time to answer had expired, was displaced by a first amended libel. Exceptions filed against the substituted pleading were sustained (Tr. of Rec., p. 9). Proctor for petitioner had opportunity, through use of pretrial proceedings, to elaborate upon the facts, but elected not to do so. Instead he filed a second amended libel and stood upon the same after exceptions thereto had been sustained. Thus, although by two amendments successively made, counsel endeavored to strengthen his position, yet upon all facts most favorable to libelant, both the district and appellate courts ruled that no cause within the admiralty and maritime jurisdiction of the Court was set forth.

It will further be noted from the allegations of the second amended libel that the basis of the claim against the United States of America is the Suits in Admiralty Act, 46 U.S.C.A., Sec. 742, and the Public Vessels Act, 46 U.S.C.A., Sec. 781. However, neither act permits proceedings against the United States of America in

cases not cognizable in admiralty against private vessels or their owners. *State of Maine vs. United States* (*The Ilex*), 134 F. (2d) 574, C.C.A. 1st Circuit. This principle was conceded by proctor for petitioner both in the district and appellate courts and no suggestion otherwise is made in the petition herein.

Accordingly, the controversy on its merits involves only one question: Does admiralty jurisdiction attach where a vessel in dragging her anchor breaks an electric power transmission cable which is attached to connections on each side of a navigable river and extends from shore to shore along the bed of the river?

The "reason relied on for the issuance of the writ" is that this is an important point of admiralty jurisdiction on which the courts in the different circuits are at variance and it is in the public interest that it be settled. Respondent denies the validity of these reasons and each of them and on its own part asserts that the petition for writ of certiorari should be denied for the following reasons:

1. This Court has no jurisdiction to entertain the petition because the application was not made within three months after entry of the decree in the Circuit Court of Appeals for the Ninth Circuit (28 U. S. C. A., Sec. 350).

2. Certiorari was denied by this Court in a previous case where the identical issue as to admiralty jurisdiction was involved. *Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co.*, 17 F. (2d) 239 (1927) C. C. A. 9th Circuit; cert. den. 274 U. S. 745, 71 L. ed. 1325.

3. No Circuit Court of Appeals has ever rendered a decision in conflict with that in the instant case; on the contrary, the only appellate court decisions involving the same issue are in accord with the decision herein (*Nippon etc. vs. Great Western Co., supra, Westfell Larson and Co. vs. Allman Hubble Tug Boat Co.* 73 F. (2d) 200 C. C. A. 9th Circuit, *United States of America vs. Tug John R. Williams,* C. C. A. 2nd Circuit, decided July 25, 1944, not yet reported. See also *Bell Telephone Company of Pennsylvania vs. United States of America* (The S. S. Cavalcade), C. C. A. 2nd Circuit, decided July 25, 1944, not yet reported.)

4. There is no public interest justifying issuance of writ of certiorari herein.

5. The principles of law governing the issue here involved have been settled by prior decisions of the Supreme Court.

ARGUMENT

I. PETITION NOT FILED IN TIME.

This case came on for hearing before the Circuit Court of Appeals for the Ninth Circuit on April 24, 1944. The Court, after hearing oral argument by proctor for appellant (petitioner herein), declined to hear argument on behalf of respondent and from the Bench ordered that the decree of the District Court be affirmed. (See "Excerpt from Proceedings," Tr. of Rec., p. 20.) On the

same date, that is April 24, 1944, final decree of the Circuit Court of Appeals, affirming the decree of the District Court, was filed and entered with the Clerk of the Appellate Court (Tr. of Rec., p. 21). Not until August 2, 1944, over three months after the decree of which petitioner complains was entered, was respondent served with notice of filing of the petition. We understand that the petition was docketed in the United States Supreme Court on the same date.

28 U. S. C. A., Sec. 350, provides:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

It is apparent that the application for writ of certiorari herein was not made within the three months' time allowed by the above quoted statute, and that the finality of the Circuit Court of Appeals decision for purposes of review has been established; hence the petition for certiorari should be dismissed.

Proctor for petitioner, however, has informally urged that the computation of time should commence not on April 24, 1944, but rather on May 8, 1944, the date on which a Per Curiam Opinion was filed in the Circuit Court of Appeals (Tr. of Rec., pp. 22, 23). Reliance is placed upon the statement of Mr. Paul P. O'Brien (Clerk of the Circuit Court of Appeals for the Ninth Circuit),

who, in his "Manual of Federal Appellate Procedure," 3rd Ed., page 283, says:

> "A judgment is entered in the Circuit Court of Appeals (C. C. A. 9), on the day the opinion is rendered and filed, and unless a petition for rehearing is filed, the time for application for writ of certiorari begins to run from the date the opinion is filed."

(No petition for rehearing was filed in the instant case.) Of course if May 8, 1944, should be considered as the starting point of the three months' period, the application herein was made in time.

It is apparent, however, that Mr. O'Brien was discussing the usual practice of the Circuit Court of Appeals for the Ninth Circuit. His statement that the time for application for writ of certiorari begins to run from the date the opinion is filed applies in ninety-nine out of one hundred cases decided in that Court. The instant case happens to be the one hundredth case, to which the statement has no application. Ordinarily the written opinion is a condition precedent to entry of the decree or judgment because the latter is necessarily based thereon. In the instant case the Per Curiam Opinion filed May 8, 1944, was obviously not a condition precedent to and was, indeed, wholly unnecessary as a basis for entry of the decree on April 24, 1944. As above pointed out, the decree was based upon the decision of the Court announced from the Bench and recorded in the Court's proceedings of the same date. To contend that the opinion of May 8th governs rather than the decree of April 24th is tantamount

to arguing that if the opinion of May 8th were never prepared or filed, the time to make application for a writ of certiorari would never commence to run!

The principle controlling in the instant case was announced in *Puget Sound Power and Light Co. vs. King County,* 264 U. S. 22, 68 L. ed. 541. (See, also, Annotation in 87 L. ed. 261.) In the Puget Sound case the Second Department of the Washington Supreme Court filed its opinion October 15, 1921. The case was re-argued before the Court en banc which, in a Per Curiam Opinion filed June 12, 1922, approved the decision of the Second Department and affirmed the judgment of the Superior Court. On July 10, 1922, there was entered in the minutes of the Washington Supreme Court an order affirming the judgment of the Superior Court. On September 22, 1922, application was made for writ of error to the United States Supreme Court. It will be noted that the application was made within three months after the judgment of the Washington Supreme Court, but more than three months after the Per Curiam Opinion was filed.

Under the applicable Washington statute, where hearing en banc was ordered and had, as in the *Puget Sound* case, the Per Curiam Decision became final when filed although there was also in the statute specific provision that a judgment should issue thereon. Upon motion to dismiss the writ of error, the United States Supreme Court said:

> "It is apparent that, however final the decision may be, it is not the judgment. It is said that the latter

> is a mere formal, ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the state, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916 * * * fixing the time in which writs of error must be applied for and allowed."

The motion to dismiss the writ granted the Puget Sound Company was denied. In other words, Congress in enacting 28 U. S. C. A., Sec. 350, meant exactly what it said: the application for the writ must be made within three months after entry of *judgment* or *decree,* not within three months after the rendering or filing of the opinion. In general, see *Rosenberg vs. Heffron,* 131 F. (2d) 80, 82, C. C. A., 9th Circuit; Cyclopedia of Federal Procedure, 2d Ed., Vol. 10, Sec. 5112.

Where no application for certiorari is filed within three months after entry of the decree, the Supreme Court loses jurisdiction to consider the merits of the decree. *Toledo Scale Co. vs. Computing Scale Co.,* 261 U. S. 399, 67 L. ed. 719.

II. CERTIORARI PREVIOUSLY DENIED.

In 1927 the Circuit Court of Appeals for the Ninth Circuit decided the *Nippon* case above cited and referred to in petitioner's brief, pages 11-13. In that case the Power Company furnished electric power for industrial uses in San Francisco. Part of the electric energy was gener-

ated in Alameda County and conducted from the County shore across to San Francisco by way of two cables which rested on the bottom of the bay. A steamship, dragging her anchor, damaged these cables. The Power Company brought a libel in personam against the owner of the ship in the District Court and was allowed to recover. The Ninth Circuit Court of Appeals reversed the District Court, holding that admiralty had no jurisdiction in the premises.

The Power Company then filed a petition for certiorari to the United States Supreme Court, the proceeding being docketed under No. 1010. Reasons assigned for granting the petition included the following:

1. The Ninth Circuit Court of Appeals had decided an important question of law in a way probably untenable and in conflict with the weight of authority.

2. The Court had decided an important question of Federal jurisdiction in a way probably in conflict with applicable decisions of the United States Supreme Court and which had not been, but should be, settled by the Supreme Court.

3. The Court had so far departed from the accepted and usual course of jurisdictional proceedings as to call for an exercise of the power of supervision of the Supreme Court.

(See petition for writ of certiorari in *Nippon* case, page 2.)

The case was ably and exhaustively briefed by proctors for both parties. On May 2, 1927, certiorari was denied, no formal opinion being rendered.

At the time of the *Nippon* decision three of the cases relied upon by proctor for petitioner herein (see p. 3, petition for writ of certiorari) had been decided, namely, *Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc.*, 221 Fed. 105, D. C., E. D., N. Y. (1915); *United States vs. North German Lloyd*, 239 Fed. 587, D. C., S. D., N. Y. (1917), and *The Toledo*, 242 Fed. 168, D. C., D. N. J. (1917).

All of the cases just cited were considered by the Circuit Court of Appeals for the Ninth Circuit in the *Nippon* case. The Court in its decision noted that all three cases involved telegraph cables which may have had some use in navigation "by the transmission of messages therethrough to direct the course and movement of vessels." No such use could follow as an incident to the purpose of a power cable. More important, however, the Circuit Court of Appeals pointed out that a power cable is analogous to a revolving shaft in a waterproof casing which might communicate physical impulses from bank to bank along the bottom of the strait. Such shaft, the Court held, would have no marine character. We quote from the *Nippon* case:

> "If the decisions in the telegraph cable cases are applicable, the lines under water become detached from the land structures and take character as a segment distinct from the rest of the physical system—a legal amphibian, truly. It would seem that such a

> segment cannot be thus separately defined, without support from the very criterion—that every injury committed by a ship is compensable in admiralty—which the Supreme Court of the United States has said is no part of American maritime law."

Assuming that the decisions in the three telegraph cable cases cited were in conflict with the *Nippon* decision which involved a power cable, that conflict was not between Circuit Courts of Appeal, as contemplated by Rule 38-5 (b) of this Court, but rather was between the Circuit Court of Appeals for the Ninth Circuit and certain District Courts in the Second and Third Circuits. As will hereafter be pointed out, the conflict with the District Courts in the Second Circuit has now been eliminated by the decision of the Circuit Court of Appeals for that Circuit in the case of the *Tug Williams*. Moreover, the Circuit Court of Appeals for the Ninth Circuit in 1934 in *Westfall Larson and Co. vs. Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200, re-affirmed its decision in the *Nippon* case and re-affirmed both holdings in its decision in the instant case. Accordingly, if it was proper for the Supreme Court of the United States to deny certiorari in the *Nippon* case, a fortiori the Court should do so in the instant case.

III. ACCORD, NOT CONFLICT, EXISTS BETWEEN CIRCUIT COURTS OF APPEALS.

The case of the *Tug Williams* was decided July 25, 1944, eight days before notice of filing the petition for

certiorari in the instant case was served. The appeal was from the Southern District of New York in the case discussed at page 14 of petitioner's brief, entitled *United States vs. Tug Williams,* 1941 A. M. C. 1588. The decision reverses the holding of the District Court which had sustained admiralty jurisdiction for injury to a telephone cable in New York Harbor and dismisses the libel as against the Tug Williams and her stipulators. At the present writing the decision remains unreported, hence we have attached as Appendix "A" to this brief a copy of all pertinent portions of the decision. It is to be noted that the Appellate Court in its decision cites the *Nippon, Westfall Larson* and instant cases, calling attention to the fact that the Circuit Court of Appeals for the Ninth Circuit "is the only Court of Appeals that has considered a question almost exactly resembling the one before us." The Court, however, overlooks a prior dictum of its own in *The No. 6,* 241 Fed. 69, 71 (1917), C. C. A. 2nd Circuit, where it observed that damage to a submarine gas pipe was not a maritime tort.

The effect of the decision by the Circuit Court of Appeals for the Second Circuit is, of course, that all District Court decisions in the same Circuit, which are not in accord with the Appellate Court's holding, are no longer the law in that Circuit. These decisions include not only the *Sanford Ross* and *North German Lloyd* cases above cited, but also *United States vs. The Majestic,* 1932 A. M. C. 1079, D. C., S. D., N. Y., and *New York Telephone Co. vs. Cities Service Transportation Co.,* 23 F. Supp. 426, D. C., E. D., N. Y. (1938) (both of which are cited

in petitioner's brief, page 13. The decision in *The Russell No. 6,* 42 F. Supp. 904, D. C., E. D., N. Y. (1941) (not discussed in petitioner's brief), holding that admiralty jurisdiction did not attach in a case involving damage to oil pipe lines running under water across the Arthur Kills, is in effect approved.

In *Bell Telephone Company vs. United States of America (The SS Cavalcade),* 1943 A. M. C. 220, D. C., E. D., N. Y. (petitioner's brief, page 14) a libel in admiralty charged the SS Cavalcade, owned by the United States of America, with negligently causing her anchor to come in contact with submarine telephone cables. Exceptions to the libel were filed on the ground that the cause was not within the admiralty jurisdiction, which exceptions were overruled. The Government then filed a petition in the United States Supreme Court, asking that a writ of prohibition issue enjoining the trial court for lack of jurisdiction from proceeding further with the cause.

The Circuit Court of Appeals for the Second Circuit, on the same date that it decided the case of the *Tug Williams,* denied the petition. The Court stated that in view of the allegations of the libel, it was "hard to see how jurisdiction in admiralty can exist if the decision in the *United States vs. Tug Williams* is correct." Despite, however, the likelihood that libelants would fail in the District Court, the Appellate Court concluded that the case should be left for decision in the lower court and "for review in due course on appeal and not disposed of on applications for writs of prohibition and mandamus." Since

the *Cavalcade* is likewise unreported as of the present writing, we attach hereto as Appendix "B" all pertinent portions of the Appellate Court's decision therein.

There remains, in the Third Circuit, *The Toledo*, 242 Fed. 168, D.C., D. N. J. (1917), the only case not yet directly overruled, which upholds admiralty jurisdiction where a vessel injures a submarine telegraph cable. But *The Toledo* ruling was disapproved in the *Nippon* case; this Court refused certiorari when it was urged that *The Toledo* decision, among others, was in conflict with the *Nippon* decision; *The Toledo* was noted, but disregarded, by the New York District Court in *The Russell No. 6; The Toledo* is in conflict with the *Mont Agel*, 1924 A. M. C. 401, D. C., N. D., La., *Postal Telegraph Cable Co. vs. SS "Cananova"*, 1942 A.M.C. 281, D.C., S.D., Fla. (both in the Fifth Circuit), and *The Trinidad*, 1932 A. M. C. 1144, D. C., W. D., Wash., (Ninth Circuit), all of which denied admiralty jurisdiction; and finally, it was disapproved by the Second Circuit Court of Appeals in the *Tug Williams*. Considering the trend of the decisions elsewhere, it is highly unlikely that if the New Jersey Court were today passing on the same issue, it would do other than follow the rule of the Second and Ninth Circuit Courts of Appeals.

IV. NO PUBLIC INTEREST JUSTIFIES ISSUANCE OF WRIT OF CERTIORARI.

The concluding portion of petitioner's brief (pp. 15-18) is devoted to the contention that it is in the public interest

to have this question of admiralty jurisdiction settled. The principal reason advanced is "the conflict of decisions in the different circuits." However, as already pointed out, that conflict was practically eliminated by the Circuit Court of Appeals for the Second Circuit a few days before the notice herein was filed.

It is urged that the use of submarine cables throughout the country is increasing, with resulting frequency of cable damage from ship's anchors. The implication seems to be that unless admiralty jurisdiction is extended, the injured cable owner is left without remedy. But where the offending vessel is privately owned, the injured claimant has his common law right of action against the owner. In Oregon the claimant may also in the State Court seize the vessel under procedure substantially identical with that in admiralty. (Secs. 67-801 (4), 67-803-817, O. C. L. A.) In any other state bordering on navigable waters where a similar boat lien law may not exist, the legislature thereof is certainly competent to adopt a similar statute.

In the instant case the United States of America, and not a private individual or corporation, is the defendant. Speaking generally upon this subject, proctor for petitioner asserts that with the huge fleet of government vessels now operating as merchant ships, cable damage is ordinarily done by action of a government ship, and unless the cable owner can sue the United States under the Suits in Admiralty Act, he is without redress.

This argument is more properly addressed to Congress than to the Court. The United States of America can

never be sued without its consent. By the Suits in Admiralty Act the Government, however, consented to be sued in admiralty in any case where a private owner or his vessel could be sued, provided however, that neither vessels of the United States nor cargo owned or possessed by the United States should be subject to arrest or seizure. The holdings in the *Tug Williams* and instant cases are simply to the effect that admiralty jurisdiction is not to be extended irrespective of the identity of the respondent. If there are practical reasons why government immunity should be lifted where a government ship injures a submarine cable, Congress is the body to do the lifting.

Reference is made by petitioner's proctor to the "hairline distinction" suggested between a telephone or telegraph cable and a power cable. Insofar as the instant case is concerned, this distinction involves only a moot question. Neither in the case of the *Tug Williams*, nor in the instant case was any contention made that the cables were aids to navigation—rather they were obstructions to navigation. Cf. *The Troy*, 208 U.S. 321, 322, 52 L. ed. 512.

We next quote from page 16 of petitioner's brief as follows:

> "The plain and indisputable fact * * * is that the cable is not a *structure* on land. It lies loosely on the bed of the river. It has, purposely, so much slack that it can be lifted to the surface and laid across barges for examination or repair. At the time it is damaged, it is not even on the bottom but lifted up and dragged therefrom by the ship's anchor, so it is actually in the water * * *. The cable is not fastened to the land as a pile driven into the river bed. It

> merely has electrical connections on the bank connecting it with the land cable * * *. It is * * * 'an adjunct, rather than a prolongation or extension of, a structure on land'."

We believe it can fairly be inferred from the opinion in each case where admiralty jurisdiction was denied that the cable in question lay loosely on the bed of the river. It was necessary in the first instance that there be sufficient slack in the cables to lay them in place. That same slack would no doubt make it possible to lift any one of these cables to the surface of the water and lay it across a barge for repairs.

This aspect of the question was considered in *Morrow S. S. Co. vs. Superior Water, Light and Power Co.*, 31 F. (2d) 486 (1928), D. C., W. D., Wis. In that case an electric cable, which normally lay on the bed of the bay, was, when damaged by collision with a ship, afloat on a line of barrels or buoys on navigable water for repair purposes. Contention was made that under the doctrine of the *Nippon* case admiralty had no jurisdiction because the cable was an instrumentality of land commerce. The Court held that at the time of the accident "this cable was in fact being navigated in a limited sense upon navigable waters and temporarily, at least, was a part of navigation. In this respect the case is clearly distinguishable from the Nippon case." The implication is that if the cable had been damaged while lying in its normal position on the bed of the bay, the rule of the *Nippon* case would have been applied. That the power cable in the instant case was capable of being lifted from the bed of the river for

repair purposes is immaterial. At the time it was fouled by the ship's anchor, it was in its normal position on the bed of the river. If, as proctor for petitioner argues, the cable at the time it was damaged had already been lifted up so that it "was actually in the water," nevertheless, the damage was the proximate result of the anchor coming in contact with the cable while the same was in its normal position, i.e., resting on the bed of the channel.

In *The Russell No. 6,* supra, at page 908, the Court said:

> "Whether the pipe lines here in question were or were not affixed to the bottom is of no moment. The pipe lines in question were affixed onto the plant on both sides of the Kill, and formed part of the libellant's plant as a whole, which could not have been operated without such pipe lines, unless some other means of sending the oil from Bayonne to Bay Way was provided."

V. GOVERNING PRINCIPLES OF LAW HERETOFORE SETTLED BY THE SUPREME COURT.

Except for denial of the petition for certiorari in the *Nippon* case we have found no decision of this Court touching upon the issue of admiralty jurisdiction where a ship's anchor damages a submarine cable. The applicable principle of law, however, has been announced by the Supreme Court in not one, but several decisions.

The relevant cases are cited and discussed in the *Nippon* and *Tug Williams* opinions. We shall not unnecessarily

repeat the discussion of those cases by the Second and Ninth Courts of Appeals. We, however, select and comment upon a few of the cases in order to indicate the principle which underlies them.

In *The Plymouth*, 3 Wall 20, 18 L. ed. 125 (1866), recovery in admiralty was denied where a wharf was damaged by fire which started on board a ship moored to the wharf. The Court ruled that both the origin and consummation of the wrong had to be completed within the navigable waters. The damaged wharf, however, was a land structure which, although used in connection with ship commerce, provided no maritime locus to support a tort libel.

In *The Blackheath*, 195 U. S. 361, 49 L. ed. 236 (1904), this Court held that damage done by a vessel to a beacon erected on a point of land, but used for the purposes of warning shipping, was cognizable in admiralty. The Court said:

> "* * * we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, — a beacon emerging from the water, — injured by the motion of the vessel, by a continuous act, beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering *The Plymouth* or any other authority binding on this court."

The ruling in *The Blackheath* was also applied in *The Raithmoor*, 241 U. S. 166, 60 L. ed. 937, where the dam-

age caused by the ship was to an incompleted beacon. We quote from the decision as follows:

> "* * * Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 320, 52 L. ed. 508, 512, * * *. In that case it was decided that the admiralty did not have jurisdiction of a claim for damages caused by a vessel adrift, through its alleged fault, to the center pier of a bridge spanning a navigable river and to a shore abutment and dock. Referring to The Blackheath, and drawing the distinction we have noted, the court said: 'The damage' (that is, in The Blackheath) 'was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function. . . . But the bridges, shore docks, protection piling, piers, etc.' (of the Cleveland Terminal Company) 'pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore, and aids to commerce on land as such'."
>
> * * * *
>
> "The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation, and while it had not yet been finished and accepted, it was being erected under the constant supervision of a government inspector acting under the authority of the United States in the improvement and protection of navigation."
>
> * * * *
>
> "This is not the case of a structure which at any time was identified with the shore, but, from the

> beginning of construction, locality and design gave it a distinctively maritime relation. When completed and in use, its injury by a colliding ship would interfere, or tend to interfere, with its service to navigation; and, while still incomplete, such an injury would tend to postpone that service. We know of no substantial reason why the jurisdiction of the admiralty should be sustained in the one case and denied in the other."

The case, however, which the Circuit Court of Appeals for the Second Circuit in the *Tug Williams,* thought to be "most nearly in point", is *The Poughkeepsie,* 162 Fed. 494 (1908), affirmed in Per Curiam opinion in 212 U. S. 558, 53 L. ed. 651. In that case certain borings had been made in the bottom of the Hudson River for the purpose of locating an aquaduct under the river. The borings consisted of iron pipes surrounded by a platform on the surface of the river. The steamer collided with the platform and pipes causing damage thereto. No connection existed between the borings and any structure on land, the borings being affixed only to the bed of the river. Admiralty jurisdiction was denied, the District Judge, among other things, saying:

> "I am unable to see how without the authority of The Blackheath the jurisdiction here could be sustained. The project which the libellant was engaged in is not even suggestive of maritime affairs. It was supplying water to a city and the mere fact of the means being carried under the bed of a river, with extensions through the river to the surface, did not create any maritime right, nor was it in any sense an aid to navigation, which was the distinguishing feature of The Blackheath."

The principles underlying the foregoing decisions may be summarized as follows:

1. Where the injured object is a shore structure or an extension of the shore and is concerned with commerce on land, admiralty jurisdiction against the offending vessel will not be sustained.

2. Where, however, the injured object, although affixed to the earth, is surrounded by navigable water, is solely an aid to navigation and maritime in nature, admiralty jurisdiction against the offending vessel will be sustained.

It is apparent that the instant case falls within the first of the above mentioned categories. Portland General Electric Company's cable lay on the bed of the river. It was attached to connections on each bank of the river. Its purpose was to transmit electrical energy from one side of the river to the other to meet the needs of petitioner's customers. No claim whatever is made that the cable was an aid to navigation or maritime in nature—indeed, from the standpoint of navigation, it would have been far better if the cable had never been laid. Its sole function was in aid of land commerce.

Undoubtedly considerations of economy, practicability, or convenience induced petitioner to place the cable on the bed of the river. The transmission line could have been an aerial cable or one attached to a bridge (if there had been a bridge at this location). Under such circumstances even the New York District Court in *Postal Telegraph Cable Co. vs. Ross,* supra, would have conceded that ad-

miralty had no jurisdiction. 221 Fed. 105, 108. The actual position of the cable on the bottom of the stream did not alter its nature or function.

If in *The Poughkeepsie*, supra, where the boring equipment was completely surrounded by navigable waters, but had no attachment with the shore, admiralty jurisdiction was denied, a fortiori in the instant case where the cable lay under the water and was physically connected with both shores, admiralty jurisdiction was properly denied.

CONCLUSION

There is neither statute nor judicial decision in the United States authorizing an Admiralty Court to award damages for injuries by vessels afloat to land structures or their extensions which are not in aid of navigation. Effort has been made to obtain Federal legislation extending admiralty jurisdiction in cases where vessels inflict damage on land structures, but such effort has been without success. Robinson, Admiralty, pp. 52, 53. Assuredly this court will not be persuaded by the prayer of petitioner to legislate judicially in a respect as to which Congress has declined to act. No showing has been made to justify this Court in reversing its long line of prior decisions holding against admiralty jurisdiction under facts substantially identical with those involved in the instant case.

For the reasons above set forth, we submit that the petition for writ of certiorari should be denied.

Dated at Portland, Oregon, this 28th day of August, 1944.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,
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APPENDIX "A"

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 230 — October Term, 1943.

(Argued February 4, 1944—Decided July 25, 1944.)

UNITED STATES OF AMERICA,
as owner of Cable No. 555,
Libellant-Appellee,

against

Tug JOHN R. WILLIAMS and GREAT LAKES DREDGE & DOCK COMPANY,
Respondent-Claimant-Appellant.

Before:
L. HAND, AUGUSTUS N. HAND and FRANK,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From a decree in admiralty which granted to the libellant, United States of America, a recovery of $2,559.83 from respondent-claimant and the Tug John. R. Williams,

the Great Lakes Dredge & Dock Company, respondent-claimant, appeals. Modified.

AUGUSTUS N. HAND, *Circuit Judge*:

The United States owned a submarine telephone cable designated as No. 555 extending across the Narrows at the entrance to New York Harbor and connecting Fort Wadsworth and Fort Hamilton. On the morning of August 22, 1938, the Tug John R. Williams, belonging to Great Lakes Dredge & Dock Company, was proceeding out through the Narrows to the dumping grounds with the loaded dump scow No. 54 in tow on a single steel hawser and bridle, the hawser being about 1¾ inches in diameter. The tug had out about 800 feet of hawser, and the bridle on the bow end of the scow was about 38 feet long. It was necessary for the tug to slow down in the Narrows in order that patrol boats operated by the War Department might come alongside and pick up permits required for dump scows and inspect the scow. On the morning of August 22 the tide was ebbing so that when the tug slowed down the headway of the dump scow No. 54 continued, causing the towing hawser to slacken and to drop under water. The Tug John R. Williams, after surrendering her permit and starting ahead at half speed, took a heavy list to port. This indicated to her master that her towing hawser was caught on something. He immediately slowed down his engine to about 1/3 speed and exerted strain on the hawser by means of the tug's steam towing machine in an unsuccessful effort to heave the hawser clear. When these efforts to heave the hawser clear

proved unavailing, its outer end was freed by cutting the bridle on the bow of the dumpscow. As the hawser was reeled it it was found badly cut for some 150 feet.

An alarm system was maintained at Fort Hamilton to give warning in the event the cable connecting that Fort with Fort Wadsworth should be damaged, and this alarm was under constant surveillance. On the morning of August 22, 1938, at 10:38 A. M., the alarm gave the signal that the cable was out of order. Lieut.-Colonel Barrows, stationed at the Fort, looked out over the area where the cable was laid and saw a tug and dumper-scow in tow which, according to the testimony of another witness, proved to be the Tug John R. Williams and her scow. This witness also testified that the dumper was coming on with the tide and that there were men on the deck of the tug trying to free the hawser. Later inspection of cable No. 555 indicated that it had been broken and that it looked "as if it had been subject to quite a strain just before parting". No part of it, however, came to the surface of the water at the time the tug was attempting to free the hawser.

Upon the evidence, which we have summarized, Judge Clancy entered an interlocutory decree in which he found that "in the absence of any other satisfactory explanation, we draw the conclusion of fact that the tug's wire rope was the agent which severed the libellant's cable". He also concluded that when the master of the tug recognized that the hawser was fouled, "running his boat for fifteen minutes at one-third speed and raising his hawser with the

towing machine within the cable area was a violation of his duty and constituted negligence which was the proximate cause of injury to libellant's cable". His conclusion was sound. When the tugmaster ascertained that his hawser had fouled on some object that must have rested on the bottom, it was negligent to go on pulling with might and main against that object for fifteen minutes, particularly in an area in which cables were known to lie. No vessel but his was near.

* * * * *

It appears from the foregoing that recovery was properly allowed against respondent, Great Lakes Dredge & Dock Company, on the merits of the litigation, but the suit was brought in admiralty and not only was Great Lakes Dredge & Dock Company made a party, but its Tug John R. Williams, in order to enforce a maritime lien. To the libel filed by the United States, the respondent and claimant raised the issue of lack of admiralty and maritime jurisdiction in the District Court. This plea was overruled by Judge Clancy, who sustained jurisdiction on the authority of *United States v. North German Lloyd,* 239 Fed. 587, and *Postal Telegraph Cable Co. v. P. Sanford Ross,* 221 Fed. 195. There have been similar decisions by district courts in both the Second and Third Circuits which have upheld admiralty jurisdiction with respect to damage done by vessels to submarine telephone and telegraph cables. *The Toledo,* 242 Fed. 168, (D. C. N. J.); *The Majestic,* 1932 AMC 1079, (S. D. N. Y.); *New York Telephone Co. v. Cities Service Transp. Co.,* 23 F. Supp. 426, (E. D. N. Y.); *Bell Telephone Co. v.*

United States, 1943 AMC 220, (E. D. N. Y.). But Judge Campbell declined to follow these decisions in *The Russell,* 42 F. Supp. 904, 907, (E. D. N. Y.), and two District Courts in the Fifth Circuit have held that courts of admiralty have no jurisdiction over suits for damage done by vessels to submarine telegraph cables. *The Mont Agel,* 1924 AMC 401, (E. D. La.); *Postal Telegraph Cable Co. v. Cananova,* 1942 AMC 481, (S. D. Fla.). The Circuit Court of Appeals of the Ninth Circuit (which is the only Court of Appeals that has considered a question almost exactly resembling the one before us) denied admiralty jurisdiction in suits for damage to submarine power cables. *Nippon Yusen Kabushika Kaisha v. Great Western Power Co.,* 17 F. (2d) 239, (C. C. A. 9), cert. denied 274 U. S. 745; *Westfall Larson and Co. v. Allman-Hubbell Tugboat Co.,* 73 F. (2d) 200, (C. C. A. 9); *Portland General Electric Co. v. United States,* 142 F. (2d) 552, (C. C. A. 9).

According to settled maritime law, if the cable had been in fault and injured the tug, a libel could have been maintained against the owner of the cable, and, as Justice Holmes said in *The Blackheath,* 195 U. S. 361, 365, "there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was." While the maritime jurisdiction of the United States may be defined and in some cases extended by Congress beyond prior decisions of the courts, there has been no legislation like that by the British Parliament allowing recovery in admiralty for injuries by ves-

sels afloat to structures on land, the use of which was not an aid to navigation. The farthest authoritative decisions have gone is to allow a suit in admiralty for injuries to beacons or clusters of piles, used for mooring vessels, where such beacons or piles, though affixed to the earth, are surrounded by water and are used as aids to navigation. *The Blackheath,* 195 U. S. 361, (damage by vessel to a beacon); *The Raithmoor,* 241 U. S. 166, (damage by vessel to a beacon in process of construction); *Doullut and Co. v. United States,* 268 U. S. 33, (cluster of piles driven in river bottom and surrounded by water). In the case at bar there is no evidence that the cable was to be used as an aid to navigation, even if that fact would have been sufficient to sustain admiralty jurisdiction. The last three decisions we have cited somewhat ameliorated the strict general rule precluding recovery for injuries where the thing damaged is connected with the earth or shore. An early decision of the Supreme Court illustrating the general rule is *The Plymouth,* 3 Wall. 20, where the owner of a warehouse and wharf was denied recovery in admiralty for damages suffered from fire that had started on a vessel moored to the wharf. The decision in *Ex parte Phoenix Ins. Co.,* 118 U. S. 610, was to the same effect. In *Johnson v. Chicago &c. Elevator Company,* 119 U. S. 388, jurisdiction in admiralty was denied where a building on land was damaged by the jibboom of a ship. In *Cleveland Terminal R. R. v. Steamship Co.,* 208 U. S. 316; *The Troy,* 208 U. S. 321, and *Martin v. West,* 222 U. S. 191, jurisdiction in admiralty was denied in suits to recover for injuries to drawbridges by vessels. Likewise in *The Panoil,* 266 U. S. 433, recovery in ad-

miralty was denied where a dike built out from the shore in order to deflect the current and deepen the channel, was injured by a vessel which negligently collided with it. Perhaps the case most nearly in point is *The Poughkeepsie,* 162 Fed. 494, affirmed in a *Per Curiam* opinion in 212 U. S. 558. There the Phoenix Construction Company had made certain pipe borings for the purpose of locating the site of an aqueduct to be built under the Hudson River in order to carry water from the Catskills to the City of New York. The boring was composed of various lengths of wrought iron pipe surrounded by a platform on the surface of the water. Respondent's steamer Poughkeepsie negligently collided with the platform and pipes with resulting damage. The bottom of the pipe was over 600 feet beneath the surface of the Hudson River, and at the point where it was situated was in about 50 feet of water. The structure was approximately 800 feet from the nearest point on the shore and was not connected with any structure attached to the land, nor was it itself attached to the land except as it was fixed to the bed of the river. The District Court for the Southern District of New York dismissed the libel filed by the Construction Company in order to recover damages to its equipment on the ground that the court lacked jurisdiction and the decision was affirmed by the Supreme Court on the authority of *Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company,* 208 U. S. 316, and *The Troy,* 208 U. S. 321, both cases of injury to drawbridges.

In the case at bar the cable which lay at the bottom of the river was certainly no different in respect to admir-

alty jurisdiction from the equipment of the Construction Company in *The Poughkeepsie, supra.* Indeed, if a most technical view of the question were taken, the connection of the cable with the shore might make the libellant's case weaker than that of the libellant in *The Poughkeepsie.*

Because the decisions of the Supreme Court preclude resort to a court of admiralty in a case like the present, we hold that the libellant's claim in so far as it involves the imposition of a maritime lien, in favor of the libellant, upon the Tug John R. Williams should be dismissed and the decree against her vacated. But the claim against the respondent in personam, though not maintainable in admiralty, is good at law and may be asserted by the United States in the District Court where the action is pending. 28 U. S. C. A., Sec. 41 (1). It can make no difference that it was originally laid in admiralty. The only right which the respondent might have lost by having the case treated as one at common law was the right of trial by jury. But it laid no foundation for availing itself of that right by demanding such a trial in accordance with Rule 38. Consequently it can have no ground of complaint. *Prince Line v. American Paper Exports,* 55 F. (2d) 1053, 1056; *U. S. ex rel. Pressprich v. Elwell and Co.,* 250 F. 939, (C. C. A. 2); *Owens v. Breitung,* 270 F. 190, 193, (C. C. A. 2); *Cory Bros. v. United States,* 51 F. (2d) 1010, (C. C. A. 2).

For the above reasons the decree is modified by vacating it and dismissing the libel as against the Tug John R. Williams and her stipulators, and is otherwise affirmed without costs to either party in this court.

APPENDIX "B"
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No.—— October Term, 1943.

(Motion argued February 4, 1944—Decided July 25, 1944.)

IN THE MATTER
of the
Petition of the United States of America for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other judges and officers of said court.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,

Libellant.

against

UNITED STATES OF AMERICA (as owner of S/S CAVALCADE),

Respondent.

Before:
L. HAND, AUGUSTUS N. HAND and FRANK,
Circuit Judges.

Petition by the United States of America for writs of prohibition and mandamus prohibiting Judge Mortimer

W. Byers of the United States District Court for the Eastern District of New York from taking any steps in certain suits in admiralty brought by the Bell Telephone Company of Pennsylvania against the United States, and by Eastern Telephone and Telegraph Company against the United States, and commanding him to vacate an order in each suit overruling the exceptions of the United States to the jurisdiction of the court and to enter an order in each suit declaring that the court is without jurisdiction thereof. Petitions denied.

AUGUSTUS N. HAND, *Circuit Judge*:

The Bell Telephone Company of Pennsylvania and Eastern Telephone and Telegraph Company filed separate libels in admiralty against the United States alleging that the Steamship Cavalcade, owned by the United States, while navigating in the Delaware River, negligently caused her anchor to come in contact with submarine telephone cables belonging to the companies, resulting in damage to the cables and requiring repairs and other expenses on the part of the owners of the cables to the amounts of $30,000 and $40,000 respectively. The respondent, the United States, filed exceptions to the libels on the ground that each failed to state a cause of action within the admiralty and maritime jurisdiction of the United States. Judge Byers, before whom the matters came on to be heard, made orders overruling the exceptions and sustaining the jurisdiction of the admiralty court. Thereupon the government filed a petition in this

court praying that a writ of prohibition issue prohibiting Judge Byers from any further exercise of jurisdiction in the above suits and that a writ of mandamus issue requiring him to vacate the orders overruling the exceptions to the jurisdiction and to enter an order in each suit declaring the court to be without jurisdiction thereof.

In our opinion in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company*, which is filed herewith, we have held the District Court without jurisdiction in admiralty where the United States sued to recover damages from a tug and its owner to a submarine cable belonging to the government and connecting Fort Hamilton, New York, and Fort Wadsworth, Staten Island. The cable was installed for the army in order to furnish telephonic communication between the two forts and lay upon the bottom of the bay. In view of the allegations in the libels filed in the suits before Judge Byers it is hard to see how jurisdiction in admiralty can exist if our decision in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company* is right, and why the libels here involved will not have to be dismissed. If, because of that decision, jurisdiction in admiralty shall be found not to exist the claims set forth in the pleadings cannot be asserted against the United States in the District Court, since under the Suits in Admiralty Act claims against it can be brought only if there would have been jurisdiction in admiralty had the vessel been privately owned or operated. 46 U. S. C. A. Section 742. If not, they can only be asserted in the Court of Claims.

In spite of the fact that the libellants are likely to fail in the suits before Judge Byers, we think the issues should be left for decision by the District Court and for review in due course on appeal, and not disposed of on applications for writs of prohibition and mandamus.

The question of admiralty jurisdiction is a close one and there have been great differences of opinion in regard to it among the judges of the District Courts as our decision in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company* points out. We can hardly know what shape these suits or the proofs which may be offered will take until more has been done than file separate libels and interpose exceptions to the formal pleadings. It is possible that before the suits can be disposed of in the District Court our decision in *United States v. The Tug John R. Williams and Great Lakes Dredge and Dock Company* may be reversed by the Supreme Court. While the issue of the writs prayed for is within our discretion, *Roche v. Evaporated Milk Ass'n*, 310 U. S. 21, 27, it is evident from the latter decision that they should be granted sparingly and with reluctance.

The government relies on *Ex parte Peru*, 318 U. S. 578. There a vessel owned by the Republic of Peru was unlawfully libelled when its immunity from seizure had been recognized by the State Department. The situation was of such public importance and international significance that the Supreme Court necessarily held that a petition for a writ of prohibition ought to be entertained. The considerations involved were very different from

those in the case at bar where nothing more than governmental convenience is presented as an excuse for applying for the writs in order to cut short a few ordinary law suits in which the issues may be determined. If our decision in the other litigation we have referred to should be reversed by the Supreme Court not even convenience would be obtained.

Petitions denied.